IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-371

No. COA21-645

Filed 17 May 2022

Wake County, No. 19 CR 203027

STATE OF NORTH CAROLINA

v.

KEVIN EMILO GILES, Defendant,

and

CRUM & FORSTER INDEMNITY COMPANY, Surety.

Appeal by Surety from order entered 7 May 2021 by Judge Sam Hamadani in Wake County District Court. Heard in the Court of Appeals 22 March 2022.

Wake County District Attorney N. Lorrin Freeman for the State.

Tharrington Smith, L.L.P., by Rod Malone and Richard A. Paschal, for Appellee Wake County Board of Education.

Hill Law, PLLC, by M. Brad Hill, for Surety-Appellant.

GRIFFIN, Judge.

¶ 1 Surety Crum & Forster Indemnity Company appeals from the trial court's order denying Surety's motion to dismiss for lack of subject matter jurisdiction and motion to set aside bond forfeiture. Surety argues that (1) the trial court lacked subject matter jurisdiction to order forfeiture of the bond because the obligation on

the bond had ended and (2) Surety's motion to set aside forfeiture should have been granted. We hold that the trial court did not err by denying the motion to dismiss for lack of subject matter jurisdiction and motion to set aside bond forfeiture.

I. Factual and Procedural Background

¶ 2 On 14 February 2019, Defendant Kevin Emilo Giles was arrested and charged with felony possession of cocaine, felony identity theft, and misdemeanor possession of drug paraphernalia. On 22 February 2019, Surety posted an $8,000 appearance bond for Defendant, securing his release. On 5 March 2019, Defendant agreed to enter into a First Offender Drug Education Program Deferral Agreement ("Agreement"). In exchange for entering the Agreement, the State dismissed the charges of possession of cocaine and identity theft.

¶ 3 In the Agreement, Defendant certified that he "freely admit[s] [his] guilt [to possession of drug paraphernalia] and agree[s] to voluntarily participate in the [program.]" Additionally, Defendant consented to this language in the Agreement: "I hereby knowingly and willfully waive my right to appeal any judgment that may be entered by the District Court as a result of a violation of this deferral agreement." Defendant was to "[s]uccessfully complete the Drug Education classes within [his] deferral period of six months" and appear in Wake County District Court for review as conditions of the Agreement. The Agreement further stated the State "shall terminate [Defendant's] diversion status upon proof of [Defendant's] failure to abide

by the foregoing agreement. [The State] shall dismiss the charges upon [Defendant's] successful completion of the program." The judge approved the Agreement.

¶ 4 Defendant failed to appear at the six-month review date in Wake County District Court, which was rescheduled for 17 January 2020 from 6 September 2019. On 11 February 2020, a Bond Forfeiture Notice was issued to Defendant. On 7 July 2020, Surety filed a Motion to Set Aside Forfeiture, arguing that "[a]ll charges for which . . . [D]efendant was bonded to appear have been finally disposed by the court other than by the State taking a dismissal with leave[.]" The Wake County School Board timely objected to Defendant's motion. The hearing, which was originally scheduled for 9 October 2020, was held on 7 May 2021.

¶ 5 Prior to the hearing, Surety filed a Motion for Relief pursuant to N.C. Gen. Stat. § 15A-547.1. In the Motion, Surety sought to "strike the bond forfeiture or otherwise remit the bail bond" and contended that, because no bond was required and should have been remitted, the court did not have subject matter jurisdiction. The trial court denied both the motion to set aside bond forfeiture and the motion to dismiss for lack of subject matter jurisdiction. Surety provided timely notice of appeal.

II. Analysis

¶ 6 Surety argues that (1) the trial court lacked subject matter jurisdiction to order forfeiture of the bond because the obligation on the bond had ended and (2) Surety's

motion to set aside forfeiture should have been granted.

A. Subject Matter Jurisdiction

¶ 7 "In an appeal from an order setting aside a bond forfeiture, the standard of review for this court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Chestnut*, 255 N.C. App. 772, 773, 806 S.E.2d 332, 334 (2017) (citations and internal quotation marks omitted). "Questions of law, including matters of statutory construction, are reviewed *de novo*." *Id.* at 774, 806 S.E.2d at 334 (citation omitted).

¶ 8 Surety argues that, per "N.C. Gen. Stat. § 15A-547.1 and/or § 15A-534(h)(5)[,]" the obligation on Defendant's bond had ended and, therefore, the trial court lacked subject matter jurisdiction to order forfeiture on the bond. Specifically, Surety contends that the three conditions for bond elimination under § 15A-547.1 were met in his case. Those conditions are (1) conviction of the defendant; (2) sentencing of the defendant to community or intermediate punishment; and (3) no pending appeal. N.C. Gen. Stat. § 15A-547.1 (2021). Surety also contends that the two conditions of section 15A-534(h)(5) to terminate obligations of Surety were met. Those conditions being that (1) the court has placed defendant on probation; (2) pursuant to deferred prosecution or conditional discharge. N.C. Gen. Stat. § 15A-534(h)(5) (2021).

1. Conviction

¶ 9 Surety argues that because "'a plea of guilty, freely, understandingly, and voluntarily entered, is equivalent to a *conviction* of the offense charged[,]' *State v. Watkins*, 283 N.C. 17, 27, 194 S.E.2d 800, 808, *cert. denied*, 414 U.S. 1000 (1973) (emphasis added)[,]" Defendant's agreement to "plead guilty" constituted a conviction. To support this argument, Surety cites N.C. Gen. Stat. § 15A-1331(b), which states that "[f]or the purpose of imposing a sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (2021). Specifically, Surety contends that Defendant's admission of guilt on the charge of possession of drug paraphernalia "in exchange for dismissal" of his other charges, and his admission of guilt pursuant to the Agreement, constituted a conviction. We disagree.

¶ 10 Under N.C. Gen. Stat. § 15A-1341(a2),

> [a] defendant . . . may be placed on probation if the court finds that prosecution has been deferred by the prosecutor, with the approval of the court, pursuant to a written agreement with the defendant, for the purpose of allowing the defendant to participate in and successfully complete the local judicially managed accountability and recovery court program.

N.C. Gen. Stat. § 15A-1341(a2) (2022).[1] This Court has held that "[t]ypically, under a deferred prosecution, the defendant signs an agreement admitting to the facts of the crime alleged; however, he is not actually entering a plea of guilty." *State v. Summers*, 268 N.C. App. 297, 299, 836 S.E.2d 316, 318 (2019) (citing *State v. Ross*, 173 N.C. App. 569, 573, 620 S.E.2d 33, 37 (2005)). "If the defendant fails to comply with the terms of the agreement, the prosecutor is free to reinstate charges." *Id.* (citing *State v. Courtney*, 372 N.C. 458, 472, 831 S.E.2d 260, 270 (2019)). "The acknowledgment of guilt contained in [a deferred prosecution] agreement, without more, is insufficient to raise the legal inference that a guilty plea was entered and accepted." *Ross*, 173 N.C. App. at 574, 620 S.E.2d at 37.

¶ 11 Surety argues Defendant's admission of guilt as part of the Agreement constitutes a guilty plea. To support this assertion, Surety cites *State v. O'Neil*, where the defendant was charged with felony larceny and entered a plea arrangement, whereby he pled guilty in exchange for admission into the first offender program and a deferred prosecution. *State v. O'Neil*, 2015 N.C. App. LEXIS 129, at *2, 239 N.C. App. 478, 770 S.E.2d 389 (Feb. 17, 2015) (unpublished). The defendant filed a motion for appropriate relief to have the plea arrangement set aside, and this Court upheld

[1] North Carolina Session Law 2022-6 (H.B. 243) modified the original language of "Drug Treatment Court Program" to read "judicially managed accountability and recovery court program." This modification has no substantive bearing upon our analysis.

the trial court's denial of the defendant's motion, stating, in part, that it constituted a motion to withdraw a guilty plea. *Id.* at *3-6. Surety contends that those facts mirror the facts of the present case, and, per *O'Neil*, Defendant's admission of guilt constitutes a guilty plea. However, the defendant in *O'Neil* entered a plea of guilty, as recognized by this Court and as recorded in the record on appeal. *Id.* at *1-2. Here, Defendant did not enter a plea.

¶ 12 While Defendant did admit to the facts of the alleged crime as required by the Agreement, this is insufficient to infer that Defendant entered and accepted a guilty plea. *Ross*, 173 N.C. App. at 574, 620 S.E.2d at 37. An admission of guilt for a deferred prosecution agreement allows the prosecution to reinstate charges if the defendant does not comply with the terms of the agreement. *Courtney*, 372 N.C. at 472, 831 S.E.2d at 270. In a subsequent prosecution, a defendant may choose to plead not guilty, and "[i]t is axiomatic that evidence of [the] defendant's opportunity to plead not guilty upon failing to meet the conditions of the [deferred prosecution] agreement supports the conclusion that the agreement did not comprehend a plea of guilty." *Ross*, 173 N.C. App. at 574, 620 S.E.2d at 37. Because Defendant did not plead guilty, it follows that he was not convicted.

2. Probation

¶ 13 Surety contends that because Defendant was placed "on probation . . . for the purpose of allowing [] [D]efendant to participate in and successfully complete the . . .

program" pursuant to N.C. Gen. Stat. § 15A-1341(a2), the obligation on the bond terminated under N.C. Gen Stat. § 15A-534(h)(5). We disagree.

¶ 14 N.C. Gen. Stat. § 15A-534(h)(5) provides that:

> A bail bond posted pursuant to this section is effective and binding upon the obligor throughout all the stages of the proceeding in the trial division of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken . . . . The obligation of an obligor . . . is terminated at an earlier time if . . . [t]he court has placed the defendant on probation pursuant to a deferred prosecution or conditional discharge.

N.C. Gen. Stat. § 15A-534(h)(5) (2021). Defendant failed to appear at the six-month review date. The charge was neither dismissed nor resolved through entry of judgment. Additionally, although the presiding judge acknowledged Defendant's entry into the Agreement under its Approval and Order subsection, Defendant did not enter a Drug Treatment Court Program pursuant to N.C. Gen. Stat. § 15A-1341(a2). Under the Agreement, Defendant agreed to "[c]omplete a Substance Abuse Assessment & comply with all treatment recommendations, the MINIMUM being 15-hours of Drug/Alcohol Education classes[,]" and to perform seventy-five hours of community service. These conditions did not order Defendant to attend a Drug Treatment Court Program. Thus, Defendant was not on probation pursuant to N.C. Gen. Stat. § 15A-1341(a2), and the obligation on the bond had not ended pursuant to N.C. Gen. Stat. § 15A-534(h)(5). Defendant was not convicted and was not on

probation pursuant to the relevant statutes. We hold that the trial court had subject matter jurisdiction to order forfeiture of the bond.

B. Motion to Set Aside Forfeiture

¶ 15 Surety argues that its motion to set aside forfeiture should have been granted by the trial court under N.C. Gen. Stat. § 15A-544.5. Specifically, the motion was premised on section 15A-544.5(b)(2), which provides that forfeiture may be set aside when "[a]ll charges for which the defendant was bonded appear to have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record." N.C. Gen. Stat. § 15A-544.5(b)(2) (2021). Surety contends that it is "undisputed" that two of the three charges secured by the bond were "finally disposed of" pursuant to dismissal by the State. Even assuming *arguendo* that two of the three charges were finally disposed, one charge still remains; namely, the charge of possession of drug paraphernalia. Because at least one charge remains and has not been finally disposed, Surety's argument is without merit.

III. Conclusion

¶ 16 For the reasons stated herein, we affirm the trial court's denial of the motion to dismiss for lack of subject matter jurisdiction and of the motion to set aside bond forfeiture.

AFFIRMED.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).